DIRECT LEGISLATION AND THE RECALL[1]

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This subject happens to be a burning issue of the times. So it may be well to say that, as students of political institutions, our attitude cannot be that of agitators or propagandists or even that of reformers. Our business is to consider political phenomena with the serene, impartial attitude of a naturalist contemplating the fauna and flora of a country. We must maintain the standpoint of scientific observation. Our object is to ascertain the truth; not to consider what particular cause may be either hindered or promoted.

At the beginning of our examination I think there is one point we should bear in mind, which is that we may not expect to discover the causes of great popular upheavals by a rationalistic examination of political projects. People are not discontented because they are theorizing; they are theorizing because they are discontented. We must always look into social conditions to find the sources of these movements. The reason is the servant of the will. We employ logic to defend a position we are impelled to take by circumstances. If we want to understand the causes of these movements now going on in this country in favor of new institutional forms, we must realize that we cannot do so by deductive reasoning starting with an abstract consideration of those forms. We must go back of them to the conditions that have suggested such proposals.

We have to do with a situation whose unsatisfactory character was recognized by the fathers themselves—by the framers of the constitution—but which they were unable to reach in their time. They were all opportunists—they had to be. They made such an application of means to ends as the opportunities of their time afforded. Nothing would have surprised the fathers more than the claims now sometimes made that the constitution should be considered as a perfect and complete embodiment of political wisdom, a settled and unchangeable scheme of governmental authority. It is a fact—which we soon discover when we go into original docu-

[1] An address delivered at the University of Pennsylvania, March 7, 1912.

ments—that the American state was corrupt and incapable from the very start, and it was just because of the delinquency of state authority that the movement toward building up national authority, which is the extraordinary characteristic of our constitutional development, has operated so strongly throughout our history. All through the writings of the framers of our national constitution you will find anxious comments on the failure of state authority, the inability of the state to furnish satisfactory institutions, its want of capacity to discharge the primary functions of government. For instance, Mercer, of Maryland, a member of the constitutional convention, said that the great duty was to protect the people "against those speculating legislatures which are now plundering them throughout the United States." Alexander Hamilton was in favor of having the President appoint the state governors, which would have put the states in about the same situation as the crown colonies of the colonial period. James Madison was in favor of giving the national government a veto power over every act of the state governments, which would put the states in the situation of the charter colonies. But this scheme of bringing back the states into subordination to authority had to be greatly modified—to a large extent abandoned in some of its features—because the small states could not be induced to agree to any arrangements that would subordinate them to the large states. Hence it was by a series of compromises that the constitution took the shape in which it appeared. James Madison was so chagrined over his failure to reform the states that he could not refrain from referring to it even when he was writing the series of newspaper articles addressed to the people of New York, now included in the volume known as the *Federalist*. He said: "The people will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the state administrations." And Jefferson himself, whose name is generally associated with the championship of state rights, in a letter to Madison under date of December 20, 1787, remarked: "The instability of our laws is really an immense evil. I think it would be well to provide in our constitution that there shall always be a twelve-month between the engrossing a bill and the passing it."

Thus it appears that the popular upheaval that is going on to-day is no new tendency, no sudden thing, as some people seem to think. It is the continuance of a struggle that has been going

on ever since this country became an independent nation, to bring political institutions into harmony with the needs of the people. In their efforts to improve their institutions, in their search for a remedy for the evils of state administration, the American people from 1776 to 1909, produced 127 distinct state constitutions. We have no official record to which we can refer to find what number of constitutional amendments have been introduced in the states, so I am not aware of any exact statement of the constitutional amendments that have been brought forward in this country, but in the decade from 1894 to 1904, 381 amendments were proposed, of which 217 were adopted. Hence it would be a great mistake to think that anything like a settled form has ever been reached in our state constitutions. There has been a continual process of experimentation, and results have never yet been satisfactory. I looked with a great deal of interest at the latest edition of Ambassador Bryce's "American Commonwealth" to notice whether or not he had modified the judgments that he expressed in the first edition some twenty years ago. Mr. Bryce is a very friendly and sympathetic critic; he is a genuine admirer of the American people; but he uses such terms, when he speaks of New York politics—and of Pennsylvania politics also, I regret to say—as "stygian pool," "a witches' sabbath of jobbing, thieving and prostitution of legislative power." He repeats these expressions in the last edition of his "American Commonwealth," and he goes on to say that there has been no marked improvement in the situation, "the factors for good and evil having not greatly changed."

It would hardly be reasonable to expect that the people would be satisfied with an organization of public authority having such characteristics. I do not think our standards are particularly high. We should be satisfied with fairly decent government; we have never had efficient government and do not really know what it means. In looking over the consular reports, I noticed in the issue of November 10, 1910, an article relating to government enterprises in Saxony. Saxony is a small country compared with most of our states. It is about one-seventh the area of Ohio, and has about the same population. It appears from this report that in the fiscal year 1910–11, property owned by the state, and public business carried on by the state—forests, mines, factories, state railroads, and so on—yielded receipts aggregating $58,734,323.

The expenditures amounted to $45,266,542, and the net receipts—profit from public business apart from taxation—amounted to $13,467,781. The gross receipts of Ohio in 1906 were a little over $7,000,000 from all sources, although Ohio has immensely superior natural resources.

I mention the case of Saxony, not because it is peculiar, but because it is typical of what business competency in public affairs ought to be. It has an organization of public authority which produces business efficiency, whereas we have not yet been able to develop an organization of public authority in our states which can behave in such a way as to be characterized as decent in the estimation of impartial historians. In the writings of the great historian, McMaster, are to be found dismal records of the failure of the American state, of its inability to engage in undertakings common in other countries, of ghastly failure in business enterprises actually attempted. Wherever you examine the facts of the case you find a story of state delinquency and business failure. That the people should protest against such conditions evinces a very natural feeling of resentment. Moreover, you may notice that this resentment against existing conditions is now becoming more urgent and active, coincident with the development of social needs that are calling for augmented power in government. We are confronted by social problems of such intense quality that we must develop efficiency in government or else we shall suffer disastrously.

I have gone into these matters to create a proper background of thought in viewing the initiative, referendum and recall, for they are expedients that have been employed in the struggle to introduce better methods, to provide means by which public authority can be reorganized and brought more into harmony with public opinion. In considering them, we must discriminate between abstract merit and practical availability. If you will consider the course of public discussion on the subject, you will find that it falls into these two categories—that those who approach the subject on the side of abstract merit oppose these institutions, whereas those who approach them on the side of practical availability are apt to approve them. Those who approach them on the side of abstract merit are able to show that history has no good report to make of processes of direct legislation. In general it may be

said that every nation which had adopted such methods, relying upon them for the character of the government, has entered the road to ruin. I need not dilate on the well-known story of ancient commonwealths, but inasmuch as the experience of Switzerland is the chief modern example cited in favor of these institutions, it should be observed that the present reputation of Switzerland for honest and efficient government is of recent origin. Swiss politics have been purified by the working of representative institutions superimposed upon their ancient forms of direct legislation of which the relics still exist. The referendum may be traced back to ancient times. So long as the people were dependent upon it they did not obtain good government. Even now, it is a point in dispute whether it is really valuable, even as an auxiliary to the representative system.

Reviewing the evidence as to the working of such institutions in Switzerland, one conclusion which it is safe to draw is that they are not an agency of progress, but they are rather obstructive and conservative in their practical operation. That is to say—to use the language of our own politics—they constitute a stand-pat rather than a progressive agency, and for that very reason the referendum is opposed by the Liberal party in England. At this very time we have this curious situation, that in England the Conservative party, that has inherited Tory traditions, is in favor of the referendum, while the Liberal party opposes it. Liberal leaders say it is a means of obstructing and delaying measures conceived in the interests of the people. At the last session of parliament, extensive measures of social reform were passed including an elaborate state insurance bill. The representatives of the people deliberated on these measures and when they took action that expressed the will of the people. Under the referendum the action of parliament would not be conclusive. Proceedings could be delayed; and just that very thing took place in Switzerland upon almost the same kind of a measure. If you consult the *Daily Consular and Trade Reports*, March 1, 1912, you will find a record of the final enactment of the Swiss federal insurance law. It passed both chambers on June 13, 1911, but the opponents of the law mustered up enough votes to call a referendum, so the final enactment did not take place until February last, a delay of over seven months. The case illustrated one point which President Lowell makes against the practical working of the referendum, namely, that measures passed in the interests of the working class—

of the poorer members of the community—may be held up and perhaps thwarted by the action of employers in getting up a call for a referendum. These are considerations that should be taken into account in estimating the value of these agencies.

But we have now to consider the argument from the side of political availability, and there we have a very different situation to consider. I must admit that my own views on this subject have been affected by a visit which I paid to Oregon a little over a year ago, where I had the opportunity to meet the people who are leading in this movement. I found that they scouted the idea of being in love with the initiative and referendum, except as an emergency measure. To talk to them of the superior advantages of representative government would be like talking to a man in a swamp about the superiority of an automobile to a scow. He would grant you that, but he would say: "Just now I need the scow; after I get out of this swamp I will use the automobile." They do not seek to destroy representative government; they want to get rid of a base imitation and introduce the real thing. When they accomplish the reorganization of public authority that they intend, they expect to drop the initiative and referendum out of ordinary use. They will then be kept in reserve simply for emergency use.

Under existing conditions some positive advantages are claimed for the initiative and referendum, as follows:

(1) *They avoid inequalities of legislative apportionment.*

Among the ideas that have come down to us from the eighteenth century is the one that there is something in the nature of superior civic quality in the votes of people that live in the country. When you examine the facts of the case you do not find it so. Practical politicians will tell you that the rural vote may be a bribe-taking vote. And yet our state constitutions seem to be generally framed on the assumption that country districts ought to be allowed greater political weight than city districts. So our legislatures are generally made up in a way grossly disproportionate in their representative arrangements. A small county will be given as great representation in a state senate as a large one, and cities are denied proportionate representation. The inequality is the more serious, since we allow senates more power than is allowed to them in any other country. In Canada they have no senates except in Quebec and Nova Scotia. All that great range of provinces on our northern border—Ontario, Manitoba,

Saskatchewan, Alberta, British Columbia—are without a senate. It is urged in behalf of the initiative and referendum that they afford means of escaping the system of minority rule that is now intrenched in our legislatures. If the people may resort to the initiative, then laws demanded by public opinion cannot be defeated by minority interests occupying positions of unjust advantage. That is a matter of great practical importance in some of our states.

(2) *They escape legislative obstruction to constitutional amendment.*

Our state constitutions put massive obstacles in the way of constitutional amendment. Proposals must run the legislative gauntlet in successive sessions. Moreover, the form of amendments may be subjected to sinister manipulation. All such barriers and difficulties are avoided by the initiative, which provides for direct appeal to the people. One of the constitutional reforms advocated in Oregon is the abolition of the state senate. What chance would there be for getting such a proposal before the people if the senate had to be asked for its permission?

(3) *They provide means of political action apart from those controlled by special interests and free from the secret entanglements of the legislative committee system.*

In our legislative bodies control over legislation is turned over to committees. The legislature is cut up, broken into fragments, and each fragment may have the power of frustrating or perverting action on the public business. Legislation becomes a matter of give and take, of bargain and deal. The control of legislative procedure by committees is a constitutional anomaly. There are more standing committees in the Pennsylvania legislature than in all the commonwealths of the British nation together. There are but four standing committees in the English parliament to transact the business of the whole empire. In Swiss commonwealths the ordinary practice is for the executive council to prepare all bills for legislative consideration. Under our system, with the facilities that exist for delaying and perverting legislation in committee rooms, almost revolutionary force is necessary before the complicated machinery will yield to the pressure of public opinion. The initiative and referendum provide means of escape from such difficulties.

(4) *The initiative and referendum make for more careful legislation.*

This claim may seem paradoxical, since it is generally supposed

that it is the peculiar merit of representative government that it ensures deliberate action. How then, it may be asked, is it possible to claim that direct action by the people themselves will produce more careful legislation. Well, as regards representative government genuinely constituted, such a claim would appear absurd; but not so as regards the sort of government we do have, that pretends to be representative but is not really so. Hence it is that Governor Wilson supports the initiative and referendum, from the standpoint of practical availability, although in his treatises on government he has described such devices as inferior to representative government. In his speech at Kansas City, May 5, 1911, he said:

> If we felt that we had genuine representative government in our state legislatures, no one would propose the initiative and referendum in America.

But, it may be said, we do have elections for the choice of representatives, and the representatives meet in legislative session, so how then can it be averred that we do not now have representative government in America? The answer is that the representatives act under conditions that make them the agents of special interests rather than representatives of the people. The quality of power is determined not by the conditions under which it is gained but by the conditions under which it is exercised. If conditions permit those in the representative position to use their opportunities for themselves and their clients, then, instead of acting as a control over the government in behalf of the people, representative institutions are converted into agencies of class advantage and personal profit. Conditions have been introduced in this country which have brought about just that result. That is the prime cause of the public discontents that are now having varied manifestations. As Edmund Burke pointed out in his classic essay on the cause of the public discontents of his time:

> When the people conceive that laws and tribunals, and even popular assemblies, are perverted from the ends of their institution, they find in the names of degenerated establishments only new motives to discontent.

The American people despise legislatures, not because they are averse to representative government, but because legislatures are in fact despicable. In view of what I have quoted from Ambassador Bryce as to the actual character of American legislatures, is it at all surprising that the American people should become impatient of their behavior?

When an American legislature meets its first concern is a distribution of patronage among its members. In other countries all appointments to office are made by the executive; the legislature does not participate, and hence it acts as a check upon extravagance. The ability of American legislatures to provide offices and salaries for attendants is a corrupting influence of immense power. The immediate effect is an irresistible pressure towards extravagance, as it is the aim of members to get as much patronage as possible. Hence it is that almost every session of an American legislature is attended by pay-roll scandals, and the freedom of action of members is compromised by the obligations they incur as office-brokers.

When the legislature gets to work there is nobody representing the community as a whole with power to propose measures and bring them to vote. Numerous bills are introduced and referred to standing committees. The number of bills introduced in a session ranges from about 1,200 in the smaller states up to 4,000 or over in Pennsylvania or New York. In the British parliament, with the affairs of an empire to administer, there are about 800 bills introduced in a session. In a Canadian provincial parliament the number is about 150. In such circumstances as these, where the representatives can act as a body of critics, discussing the estimates and proposals of the administration you have representative government. But when the bills are thrown in by thousands, and put through by logrolling you have only a wretched travesty of representative government. In this way a mass of crude, obscure, sinister, perverted legislation is dumped into our statute books year after year. The courts have frequently to go behind the language of the law and guess at the legislative intent. As a consequence the judiciary has virtually annexed the legislative function.

It is in comparison with this chance medley and not in comparison with the deliberate procedure of representative government as exemplified in England and in Switzerland, that the claim is advanced that the initiative and referendum make for more careful legislation. Before a law is submitted by that process it undergoes a course of careful preparation. Drafts are passed from group to group of people, for examination and criticism. The phraseology is carefully scrutinized, and gradually perfected, for once it goes upon the voting papers it is not open to amendment, and the exposure of a defect might frustrate the movement for that year at least. From personal

investigation of the case I am satisfied that the process of legislation by initiative as practised in Oregon does provide for more careful legislation than the ordinary procedure in an American legislature.

(5) *The initiative and referendum clear the way for a reorganization of public authority.*

The force of this claim will be admitted by anyone who will take the trouble to examine the scheme of government that the Oregon reformers are trying to introduce. It would be hopeless to expect that it could ever get through a legislature of the type now existing. To propose it to the legislature would be inviting that body to commit suicide, for it abolishes the senate and provides for a representative assembly of a different type from anything now known in this country although much like that found in Canada and other English commonwealths. The governor is to appoint his cabinet associates and he will sustain about the same relation to the assembly as the president of a joint-stock company does to its board of directors. The ambushes and concealments of the legislative committee system will be swept away. The governor will have the right to introduce his measures and if the assembly reject them he is to have the right to call a referendum and lay them before the people. It will be seen that the movement is far more than an amendment of the present state constitution; it proposes a new state constitution. It can have no chance of success unless it can find an outlet distinct from any channel of action allowed by the present state constitution. So likewise the movement which substituted our national constitution for the articles of confederation had to find a new channel. That movement was started by voluntary initiative outside of the federal legislature and outside of the system provided by the articles of confederation.

I do not deny that there are risks—grave risks—attending any process of constitutional change by initiative. The case of revolutionary France has not lost its pertinence. Mistakes may be and doubtless will be made. But the risks are limited by the essentially municipal character of the American state. The trouble that may ensue from experimentation can hardly be greater or more varied than that which has attended experimentation in city government. If anywhere an efficient organization of state authority is produced, the type will spread like the commission plan of city government. The Oregon movement is pregnant with developments of the greatest hope and promise.

And now, what about the recall. Here again, I must distinguish between the principle and the application. The essential principle of the recall is that a public servant may be dismissed if his conduct does not give satisfaction. Is there anything unconstitutional about that? It is not so regarded in the organization of business authority. A common provision of the by-laws of a business corporation is that any agent or employee of the corporation may be dismissed by the board of directors "with cause or without cause." It is a deposit of sovereignty which in practice does not tend to instability of tenure. Capable employees go on holding their places year after year, although their tenure is subject to the pleasure of the directors. It is the same with English municipal corporations. Employees hold their places during the pleasure of the mayor and city council, but in practice their tenure is permanent during good behavior. That is the general rule of English government. Every administrative officer holds office, not for any particular term, but during good behavior, of which the head of the administration is the judge. The case of judges differs only in that in their case parliament is the judge of their behavior. Any judge may be removed by the head of the administration upon the address of the House of Commons. The process is not one of impeachment, or of trial, but is an act of sovereignty, subject to no conditions save such as are voluntarily imposed. Instances of the actual exercise of this power of judicial recall are rare, for it is so incontestible that judges behave themselves in such a way as not to arouse it to action. An incomplete instance is, however, afforded by certain proceedings taken last year in regard to an English judge who had given offense. Here is the report which appeared in the weekly edition of the *London Times*, March 3, 1911:

> In the House of Commons on Wednesday, Mr. Rendall asked the prime minister if he could yet inform the house in what way the government proposed to deal with the unique situation resulting from the speech of Mr. Justice Grantham at Liverpool on February 7. The prime minister said: His Majesty's government have given full consideration to this matter, the gravity of which, as I said the other day, they entirely recognize. They observe with satisfaction and without surprise that the speech referred to has been universally and emphatically condemned by professional and public opinion. In the hope and belief that this unanimous verdict of censure may prevent the recurrence of an incident so inconsistent with the judicial character and the best traditions of the bench, they do not propose to invite parliament on this occasion to take the extreme step of addressing the crown for the removal of the judge.

It is plain from this that the attitude of the House of Commons to judges is virtually this: Be on your good behavior or we will remove you.

Another instance of this constitutional relation is afforded by language used by a leading member of the English government—Winston Churchill—when, as home secretary, he presented a bill dealing with the subject of crime committed by aliens. An existing law provided that an alien convicted of crime could be deported on the certificate of the judge sitting in the case. He remarked that there was no need for more law in that respect, but what was needed was additional means for securing the enforcement of the law. The weekly edition of the *London Times*, for April 21, 1911, says in its report of the speech:

> He called particular attention to the comparatively small number of convicted aliens who were recommended for expulsion by the courts. With a view to increasing the number of expulsions, he proposed in his bill that whenever a court did not recommend expulsion, it should be called upon to furnish its reasons.

This attitude towards the judges implies that if they fail to show good reasons they may be removed. Do English courts suffer in dignity and efficiency because the judges are thus subject to recall? Not at all. On the contrary, that very fact exalts the judicial position. The judges sit as the full representative of the sovereign power of the state. They are trusted with immense power because that power can be withdrawn at any time if misused. But when the judiciary is treated—as in this country—as an independent and co-ordinate branch of the government, the theory by its own terms makes the judges representative of only a fraction of sovereignty, and their behavior is accordingly subjected to conditions and limitations unknown to English courts. When we compare the decay of public justice in this country with the efficient administration of justice in the English courts, can there be any doubt as to which system possesses actual superiority in quality of jurisprudence? It is generally assumed that, whatever may be the abstract merits of the case, the English mode of recall is incompatible with our constitutional system. Well, so far as our states are concerned, there is a chaos rather than a system, but the English mode certainly exists in Massachusetts. Nor can I find anything inconsistent with it in the constitution of the United States. The supposition that there is no way of getting rid of a misbehaving judge save by impeachment proceedings,

is not supported by the language of the constitution itself. Article III, on the judicial power, provides that judges "shall hold their offices during good behavior," and that their compensation "shall not be diminished during their continuance in office." Who is to be the judge, if it is not the body corresponding to the House of Commons? The provision for impeachment is contained in section 4 of article II, dealing with the executive power. It provides that "the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors." If judges can be removed only by proceedings under this section then mere avoidance of crime must be held to constitute good behavior, which is an absurd conclusion. In 1802, when the framers of the constitution were still on the stage of affairs, congress, with the approval of the President, abolished a number of courts and dismissed their judges from office. I commend that precedent to the consideration of those who think that the judicial recall is inconsistent with the constitutional ideas of the founders of our institutions.

Very different considerations arise, however, when we examine the proposition that judicial recall shall be allowed upon popular petition. The principle of recall is constitutional; indeed, it may be questioned whether constitutional government can really exist without it. The essence of constitutional government is that for every act of power there shall be a responsible agent. This principle is violated when any agent is so situated that he cannot be reached and removed if need be. It is also violated if the process of removal is carried on in an irresponsible way. Removal through the address of the representatives of the people, approved by the administration, accepts a direct responsibility to public opinion for the proceeding and its results. But what responsibility would attach to a movement carried on by petition-pushing along the streets? Is it not plain that it may put vast irresponsible power in the hands of faction? In practice, it would mean that any political machine could exert pressure upon the courts through power to hurl a judge into the arena to fight for his life. The widespread demand for the recall expresses a sound constitutional instinct, but it is liable to go astray and deviate from democracy into ochlocracy. The present state of things is so intolerable that change is inevitable. Genuine conservatism will be shown, not in resistance to change, but in wise guidance of change.